Supreme Court, U.S.
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No. 99-1289

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA

ex rel.

AMERICAN TEXTILE MANUFACTURERS INSTITUTE, INC.,

Petitioner,

v.

THE LIMITED, INC., *et al.*,
TARRANT APPAREL GROUP, *et al.*,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

TARRANT RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

(1) Whether the Court of Appeals correctly affirmed the dismissal of Petitioner's complaint for its failure to state a claim under **31 U.S.C. § 3729(a)(7)** when: (a) Petitioner's theories of liability did not involve existing legal duties to pay money to the government; and (b) Petitioner's complaint sought recovery for contingent obligations that could only arise after the exercise of discretion by government officials?

(2) Whether the Court of Appeals properly declined to vacate the District Court's dismissal when the District Court's decision was based entirely upon questions of law that had been reviewed de novo by a subsequent District Court Judge on reconsideration and by the Appellate Court on appeal?

PARTIES TO THE PROCEEDING AND STATEMENT PURSUANT TO RULE 29.6

Petitioner:

United States of America, *ex rel.* American Textile Manufacturers Institute, Inc.

Respondents:

1. The Limited, Inc.; The Limited London-Paris-New York, Inc.; Limited Too, Inc.; Intimate Brands, Inc.; Victoria's Secret Stores, Inc.; Victoria's Secret Catalogue, Inc.; Cacique, Inc.; Mast Industries, Inc.; Express, Inc.; Lerner New York, Inc.; Lane Bryant, Inc.; Henri Bendel, Inc.; Structure, Inc.; Abercrombie & Fitch, Inc.

2. Tarrant Apparel Group, d/b/a Fashion Resource, Inc.; Gerard Guez; and Todd Kay. There is no parent or publicly held company owning 10 percent or more of the Tarrant Apparel Group's stock.

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STATEMENT OF THE CASE

A. Petitioner's Allegations Of Contingent Obligations.

Petitioner is a national association of domestic textile and apparel manufacturers. **(App. 145)**. Tarrant Apparel Group ("Tarrant"), The Limited, Inc. (the "Limited") and their related companies engage in the importation and sale of wearing apparel. **(App. 30; 145-151)**. Petitioner's members and Defendants thus compete in the highly competitive clothing industry.

On September 25, 1996, Petitioner filed a complaint on behalf of the United States Government in the United States District Court for the Central District of California under the qui tam provisions of the **False Claims Act, 31 U.S.C. § 3730**. Petitioner's complaint alleged a "reverse false claim" under **31 U.S.C. § 3729(a)(7)**,[1] which prohibits a knowingly "false statement to conceal, avoid or decrease an obligation to pay . . . money or property to the Government." Petitioner named

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1. The reverse false claims provision is set forth in **31 U.S.C. § 3729(a)(7)**, which in relevant part provides:

Any person who —

> (7) knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government

is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus three times the amount of damages which the Government sustains because of the act of that person [with certain exceptions not at issue here].

as Defendants the Limited, several of its related companies (hereinafter collectively the "Limited Defendants"), Tarrant, its Chief Executive Officer, Gerald Guez, and its President, Todd Kay (herein collectively the "Tarrant Defendants").[2] The case subsequently was transferred to the United States District Court for the Southern District of Ohio, Eastern Division, and randomly assigned to the Honorable Judge Holschuh.

Petitioner's complaint was based entirely upon alleged customs violations by the Tarrant and Limited Defendants. Petitioner alleged that the Tarrant and Limited Defendants

> engaged in a pattern or practice of trade pursuant to which articles of apparel produced in the People's Republic of China have been transshipped to Hong Kong or Macau; have been falsely labelled as the products of Hong Kong or Macau; and have been knowingly represented to be the products of Hong Kong or Macau in official entry documents submitted to Customs by or on behalf of said Defendants;

and that the "false records or statements made by Defendants have permitted them to evade country-specific quota

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2. Petitioner undoubtedly named Messrs. Guez and Kay (both residents of California) as Defendants in an effort to secure a California forum to adjudicate this dispute. Nearly all of the Defendants are Limited related companies with their primary place of business in Columbus, Ohio. There were no allegations in the complaint that justified individual liability, and Guez and Kay separately moved for dismissal. Since the Complaint failed to state a claim against all Defendants, the District Court found that it was not necessary to resolve the dismissal motion filed by the individual Defendants. (**App. 42**).

restrictions and to conceal from Customs the actual country of origin" in violation of country-specific quota restrictions and the Customs laws. **(App. 2-3; 143-144)**. According to Petitioner's complaint, Defendants' alleged transhipment practices violated **18 U.S.C. § 545, 19 U.S.C. § 1595a(b), 19 U.S.C. § 1592, 19 U.S.C. § 1623 and 19 C.F.R. Part 113, 19 U.S.C. § 1304(h)**, and **15 U.S.C. §§ 45(m), 70a(a) and 70b(b)(4). (App. 198-209)**.

Petitioner did not allege that the Government had found that the Tarrant and/or Limited Defendants violated any of the referenced statutes. Nor did Petitioner allege that there had been any fines or penalties assessed against any Defendants. The Court of Appeals specifically found that "[t]he joint appendix does not suggest that the government has alleged wrongdoing, let alone that the government has found that the defendants broke any law." **(App. 8)**.

Petitioner did not plead the existence of a legal duty on the part of Defendants to pay money to the Government. Each of the alleged statutory violations required the Government to take certain action within its discretion before Defendants could have been liable for any of the fines and penalties. For example, Counts 1 **(18 U.S.C. § 545)**, 2 **(19 U.S.C. § 1595a(b))**, 3 **(19 U.S.C. § 1592)** and 6 **(15 U.S.C. §§ 45(m), 70a(a)** and **70b(b)(4))** of Petitioner's complaint involved the concealment of alleged civil and criminal penalties for the violations of these statutes. None of the fines and penalties could have been assessed, however, without certain legal and administrative proceedings during which Defendants would have been afforded the opportunity to contest the imposition and amount of the penalties. **See**, for example, **19 U.S.C. § 1595a(a); 19 C.F.R. §§ 162.31, 170.0 et seq., 19 U.S.C. § 1615; 28 U.S.C. § 1355(a)**.

In Count 4, Petitioner alleged that the Tarrant and Limited Defendants made false statements to avoid paying liquidated damages for an alleged default of certain customs bond agreements. The obligation to pay liquidated damages does not arise until after Customs has taken certain actions, including a determination that the importer has breached the terms of the customs bonds. **See 19 C.F.R. § 172.1(a)**. Even if Customs determines that such a breach has occurred and makes a demand, the principal and surety have a right to petition for relief. **See 19 C.F.R. § 172.1(b)**.[3] Similarly, Count 5 of the complaint alleged that the Tarrant and Limited Defendants made false statements to avoid paying marking duties under **19 U.S.C. § 1304(h)**. Before any such penalties could have been due, however, there had to be a formal finding by Customs that the goods were mismarked, **19 C.F.R. § 134.51**, and that the importer failed to either properly mark, export, or destroy the subject merchandise. **See 19 U.S.C. § 1304(h)**. **See also Pentax Corporation v. Robison, 125 F.3d 1457 (Fed. Cir. 1997), amended on rehearing, 135 F.3d 760 (Fed. Cir. 1998)**.

In its complaint, Petitioner did not allege that any of the prerequisites described above had occurred. Nor could it. As such, Petitioner utterly failed to demonstrate existing

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3. In addition, the statute authorizing Customs to impose bonding requirements specifically authorizes Customs to cancel the bond or any charge made under the bond, "upon the payment of such lesser amount or penalty or upon such other terms and conditions as [Customs] may deem sufficient." **19 U.S.C. § 1623(c); 19 C.F.R. § 113.15. See also 19 C.F.R. § 113.53** (Customs may waive bond requirements unconditionally or with conditions); **19 C.F.R. § 113.54** (Customs is authorized to cancel charges against bonds made erroneously or upon determination that the act or condition forming the basis for default did not occur).

"obligations" on the part of Defendants to pay any fines or penalties under the subject statutes.[4]

B. The District Court's Dismissal For A Failure To State A Claim Under § 3729(a)(7) And Petitioner's Belated Recusal Motion.

On November 13, 1997, the District Court entered a comprehensive decision dismissing Relator's complaint for a failure to state a claim upon which relief may be granted. **(App. 30)**. In its opinion, the District Court held that an "obligation" under **§ 3729(a)(7)** required an existing and present duty to pay money and that the term did not include potential fines or penalties from alleged statutory violations. **(App. 62-63)**. Because Petitioner failed to set forth the concealment or avoidance of an existing duty to pay money to the government, the District Court dismissed Petitioner's complaint with prejudice. **(App. 72-73)**.

On November 28, 1997, approximately two weeks after the District Court's dismissal, Petitioner moved to recuse the District Court Judge, the Honorable John Holschuh, under **28 U.S.C. § 455(a)**. Earlier that year, Judge Holschuh was represented in traffic court by James Arnold, a lawyer in the Columbus law firm of Vorys, Sater, Seymour and Pease. **(App. 74-75)**. Mr. Arnold's representation of the Judge occurred in May, 1997, and Judge Holschuh paid Mr. Arnold's fees on June 24, 1997. **(App. 75, 77)**. In its recusal motion, Petitioner claimed that Mr. Arnold's prior representation of the Judge would cause a reasonable person

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4. Petitioner's attempted use of the **False Claims Act** was thus entirely novel, and the Government declined to intervene as a plaintiff in the lawsuit under **31 U.S.C. § 3730(b)(4)(B)**. **(App. 2)**.

to question Judge Holschuh's impartiality. District Judge Holschuh specifically found that "the timing of the motion, as well as its tone and content, are suggestive of interest not in recusal, but in avoiding the consequences of an adverse ruling." **(App. 83)**.[5] Nevertheless, Judge Holschuh granted Petitioner the benefit of the doubt, and voluntarily recused himself. **(App. 83-84)**. Judge Holschuh denied Petitioner's request to vacate the dismissal based on the factors set forth by the Supreme Court in **Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847 (1988)**.[6] Judge Holschuh did not rule on the motion to alter or amend judgment, and he invited any subsequent judge to review his November 13 decision de novo. **(App. 84-88)**.

On January 5, 1998, the Chief Judge for the Southern District of Ohio assigned the case to Judge Beckwith. Petitioner filed another motion to vacate the November 13, 1997 judgment and a motion for leave to file a second amended complaint. The District Court, per Judge Beckwith, denied Petitioner's motion to vacate. It held that vacatur was not required under the Supreme Court's decision in **Liljeberg**, **supra**. The District Court also found that the

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5. Judge Holschuh's appearance in traffic court six months prior to the recusal motion was a matter of public record and it was done in the presence of the media. **(App. 75, 81)**. Petitioner claims that it was unaware of Mr. Arnold's representation until the day after the Judge had dismissed Petitioner's complaint.

6. In **Liljeberg, supra**, this Court held that when deciding to vacate an entry, the Courts should "consider [(1)] the risk of injustice to the parties in the particular case, [(2)] the risk that the denial of relief will produce injustice in other cases, and [(3)] the risk of undermining the public's confidence in the judicial process." **Id.** at 864.

motion to amend or alter the judgment was not well taken. Although not required under **Fed. R. Civ. P. 59(e)**, the District Court reviewed the November judgment de novo and found no error. (**App. 109, n.11**). Finally, the District Court concluded that any further amendments to the complaint would be futile. (**App. 109-112**).

C. The Sixth Circuit's Plenary Review of the District Court's Dismissal.

Petitioner filed an appeal with the United States Court of Appeals for the Sixth Circuit respecting the dismissal of Petitioner's complaint and the denial of its motions to vacate the November 13 judgment. Like the District Court, the Court of Appeals examined the words of the statute, its procedural history and the relevant case law, including the Eighth Circuit's decision in **United States v. Q International Courier, Inc., 131 F.3d 770 (8th Cir. 1997)**.[7] The Appellate Court found, and Petitioner has conceded in its petition, that a plaintiff may not state a reverse false claim unless the obligation sought to be avoided attached before the defendant made the false statement. (**App. 9, Petition p. 15-16 n.5**). The Court of Appeals did not purport to define the entire scope of an obligation under the statute. It found that in order to prosecute a reverse false claim a plaintiff must demonstrate an obligation that is sufficiently certain in nature to give rise to a debt at common law, and that potential fines or penalties imposed after a finding of wrongdoing do not give rise to liability. (**App. 13, 19**). According to the Appellate Court:

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7. **Q International, supra**, represented the only published federal appellate decision interpreting "obligation" under **§ 3729(a)(7)**.

> **31 U.S.C. § 3729(a)**'s definition of "obligation" clearly includes those arising from acknowledgements of indebtedness, final judgment and breaches of government contracts, and that the definition does not include those contingent obligations that arise only because the government has prohibited an act, or arising after the exercise of government discretion.

(App. 13, 19, 25). After examining Petitioner's complaint, the Court of Appeals found that the complaint alleged obligations which were either contingent or did not exist prior to the submission of the allegedly false statements by Defendants. It therefore affirmed the District Court's judgment dismissing Petitioner's complaint.

With regard to the issue of recusal and vacatur, the Appellate Court ruled that it was not necessary to consider this issue due to the subsequent de novo reviews of the District Court's judgment:

> In light of our disposition of the case as a matter of law, and given District Judge Beckwith's *de novo* review of District Judge Holschuh's decision, we see no need to decide whether Judge Holschuh faced mandatory recusal, and to require a third district judge to decide whether [Petitioner] has stated viable claims.

(App. 28).

REASONS FOR DENYING THE WRIT

Supreme Court Rule 10 provides that "[a] petition for a writ of certiorari will be granted only for compelling reasons." Here, it is clear that compelling reasons do not exist. The Court of Appeals' decision correctly affirmed the District Court's judgment and the decisions below do not depart from the accepted and usual course of judicial proceedings. Nor does the Appellate Court's decision conflict with the decisions of other circuit courts. Moreover, the decisions below are limited and do not present issues requiring review by the Supreme Court.

In addition, there is a significant jurisdictional issue over whether petitioner can even prosecute a qui tam lawsuit, depending upon the outcome of this Court's decision in **State of Vermont Agency of Natural Resources v. United States of America ex rel. Stevens, Case No. 98-1828**. In **Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992)**, this Court held that "the irreducible constitutional minimum of standing contains three elements:" (1) an injury in fact that is concrete and particularized and actual or imminent; (2) a causal connection between the injury and the conduct complained of; and (3) that it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. **Id. at 560-61**. The Court further explained that the injury must "affect the plaintiff in a personal and individual way." **Id. at n.1**. **See also Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 103-04 (1998)** (recognizing "triad of injury in fact, causation, and redressability" as the "core of Article III's case-or-controversy requirement * * *"). In this case, Petitioner did not suffer the "personal and individual injury" necessary to support standing under Article III of the United States Constitution.

I.

PETITIONER'S COMPLAINT WAS DISMISSED FOR ITS FAILURE TO STATE AN EXISTING OBLIGATION UNDER § 3729(A)(7) AND THERE IS NO COMPELLING REASON TO REVIEW THE DISMISSAL.

A. The Court Of Appeals Correctly Affirmed The Dismissal Of Petitioner's Complaint Based On The Plain Language Of The Statute And Its Legislative History.

The District Court dismissed Petitioner's complaint for its failure to state a cognizable claim under **§ 3729(a)(7)**, and the Court of Appeals affirmed. In its opinion, the Court of Appeals found that an obligation under **§ 3729(a)(7)** includes "acknowledgements of indebtedness, final judgments, and breaches of government contracts." **(App. 25)**. The Appellate Court also determined that contingent obligations, which arise after the exercise of discretion by a government official, do not fall under the rubric of **§ 3729(a)(7)**.

The Court of Appeals' decision is based on the plain words of **§ 3729(a)(7)**. By its terms, there is no indication that the statute was intended to include anything other than an existing, legally enforceable obligation. Nor is there anything in the statute to suggest that the term obligation includes potential, future or possible obligations. As one appellate court has noted, "[h]ad Congress wished to cover attempts to avoid potential fines or sanctions it would have used language appropriate to that end." **United States v. Q International Courier, Inc., 131 F.3d 770, 773 (8th Cir. 1997)**.

Moreover, the legislative history of **§ 3729(a)(7)** also supports the Appellate Court's decision. For example, the legislative history specifically states that **(a)(7)** amended the **Act** "to provide that an individual who makes a material misrepresentation to avoid paying money owed the Government would be equally liable under the Act as if he had submitted a false claim to receive money." **S. Rep. 99-345 at 18, reprinted in 1986 U.S.C.C.A.N. 5266, 5283 (1986)** (emphasis added). In addition, the 1986 Senate report from the legislative history stated:

> A fraudulent attempt to pay the Government less than is owed in connection with any goods, services, concessions, or other benefits provided by the Government is also a false claim under the act.

S. Rep. 99-345 at 9, reprinted in 1986 U.S.C.C.A.N. 5266, 5274 (1986) (emphasis added). The House report on **§ 3729(a)(7)** also stated:

> Another amendment to the current law contained in H.R. 4827 allows the Government to prosecute a false claim which has been filed for the purpose of reducing the amount the claimant owes to the Government. Under the current statute, case law has held that the statute did not provide for liability in such a situation. The Committee felt that there is no reason to treat a false claim filed against the Government to fraudulently reduce an obligation owed to the Government differently from one filed for the purpose of fraudulently obtaining money. The Government should have the ability to collect all losses suffered through fraud.

H.R. Rep. No. 99-660 at 20 (emphasis added).[8] Congress' references in the legislative history to "money owed," "less than is owed," "pay . . . less than is owed," "the amount the claimant owes" and "to fraudulently reduce an obligation owed" clearly indicate that the reverse false claim provision was intended to prevent an attempt to conceal an existing, legally enforceable obligation to pay money to the government. At a minimum, these references reflect that Congress did not intend the term "obligation" to cover possible, future or potential fines or penalties that may be due following the exercise of the government's discretion or the outcome of certain administrative and/or legal proceedings.

Petitioner argues that "[t]he exclusion of unconditional 'obligations,' whenever a federal official would have discretion not to enforce them, is contrary to the logic of the statute and this Court's instructions for interpreting federal statutes." (**Petition, p. 14**). This argument misses the mark. There were no unconditional obligations identified in Petitioner's complaint. As noted above, these alleged statutory violations were anything but unconditional. There were several conditions that had to occur before liability could attach, and Petitioner's complaint did not allege that these prerequisites had occurred.

Petitioner contends that the Court of Appeals wrongly construed **§ 3729(a)(7)** by limiting the reach of the statute based on policy considerations. According to the Petitioner,

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8. Congress ultimately adopted the Senate version of the reverse false claims act provision, but the House and Senate versions of **3729(a)(7)** are identical. See **S. 1562, 99th Cong. (1986)**, reprinted in **S. Rep. No. 99-345 at 39 and H.R. 4827, 99th Cong. (1986)**, reprinted in **H.R. Rep. No. 99-660 at 2**.

Congress favored an expansive interpretation of the reverse false claims provision of the False Claims Act based on this Court's decision in **United States v. Neifert-White, 390 U.S. 228 (1968)**. There is no support for Petitioner's contentions. The Appellate Court's construction of the statute is entirely consistent with its terms and the legislative history identified above. There is no indication that the Court of Appeals allowed policy considerations to overrule the terms of the statute. Indeed, the Appellate Court acknowledged that "a court may not allow policy considerations to trump the plain language of a statute." **(App. 20)**.

Moreover, the plain language of the statute did not support the overly broad interpretation that was urged by Petitioner. Under Petitioner's view, the reverse false claims provision would apply to any situation involving possible, future or potential monetary fines and/or penalties from alleged statutory violations. To construe the statute in such a manner would, as the District Court found, subject every record keeping business to false claims liability,[9] and open

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9. In its opinion, the District Court held:

> The language Congress used and the legislative history simply cannot be reconciled with the recognition that literally millions of records are maintained by every business engaged in commerce within the United States; that a failure to maintain accurate records frequently subjects the business to sanctions under specific statutes and regulations; and that innumerable private lawsuits could be filed if the FCA is viewed as a tool to obtain a damage award for improper or inaccurate record keeping that fails to reflect some alleged violation of federal law.

(App. 61).

the floodgate of litigation.[10] According to the Court of Appeals,

> If the reverse false claims provision encompasses the defendants' actions, it has incredible scope, permitting suits against any person who makes a false statement to the federal government that he did not commit a statutory or regulatory violation that might have led to the imposition of a fine, payment of liquidated damages, imposition of a tax, or for forfeiture of property.

(App. 21).[11] Therefore, the Appellate Court properly rejected Petitioner's overly broad construction of **§ 3729(a)(7)** to

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10. This case provides an excellent illustration of the abuse that would necessarily follow from an expansive interpretation of the Act. Here, Petitioner has used the statute to harass its competitors by attempting to collect millions of dollars in penalties and fines for alleged customs violations, even though no such fines or penalties had ever been levied or assessed against Defendants. As the Court of Appeals found, the government had envisioned this potential for abuse in an amicus brief before the district court in **United States ex rel. Sequoia Orange Co. v. Oxnard Lemon Co., Case No. CV-F-91-194, 1992 WL 795477 (E.D. Ca. May 4, 1992)**:

> The government [in its amicus brief] contended that an expansive interpretation would interfere with federal regulatory enforcement schemes, and permit companies to use qui tam litigation to harass competitors.

(App. 23).

11. An example of the absurdity in Petitioner's position is illustrated in a leading treatise on the **False Claims Act** as follows:

(Cont'd)

avoid absurd, unjust and unreasonable results. See, for example, American Tobacco Co. v. Patterson, 456 U.S. 63, 71 (1982) ("[s]tatutes should be interpreted to avoid untenable distinctions and unreasonable results whenever possible"); Armstrong Paint & Varnish Works v. NU-Enamel Corporation, 305 U.S. 315, 333 (1938) ("to construe statutes so as to avoid results glaringly absurd, has long been a judicial function").

Finally, Petitioner's reliance on this Court's decision in Neifert-White, 390 U.S. 228 (1968) for an expansive construction of § 3729(a)(7) is misplaced. That case has little application, if any, to the issues presented here. Neifert-White, supra, was decided prior to the enactment of § 3729(a)(7), and the Court in that case construed the meaning of the term "claim" and not obligation.

B. There Is No Conflict Among Circuit Courts Respecting The Meaning Of Obligation Under § 3729(a)(7).

In addition to the fact that the Court of Appeals' ruling is correct, this matter does not warrant review because there

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(Cont'd)

> [I]magin[e] a motorist who, stopped for speeding in a Federal park, blurts out, "But officer, I was only doing the speed limit!" Assuming the motorist's statement to be false, this attempt to avoid a seventy-five dollar speeding ticket, payment of which the United States is entitled, could generate liability for a $10,000 penalty under the False Claims Act.

John T. Boese, Civil False Claims and Qui Tam Actions, 2-30 (Supp. 1995).

is no conflict among the federal appellate courts respecting the interpretation of an obligation under **§ 3729(a)(7)**.

The Eighth Circuit is the only other circuit court to thoroughly examine the meaning of an obligation under **§ 3729(a)(7)**. In **United States v. Q International Courier, Inc., 131 F.3d 770**, the circuit court affirmed the grant of summary judgment for the government's failure to prove an "obligation" within the meaning of **§ 3729(a)(7)**. There, the defendants were sued under the reverse false claims provision for violating certain statutes and regulations. The government alleged that the defendants shipped bulk mail from the United States to Barbados and then mailed the letters back to the United States at postal rates which were cheaper than domestic rates. The government argued that the defendants owed an obligation to the United States for the full domestic postage for each letter and that the defendants attempted to reduce this obligation through fraudulent statements and records. The court found that the United States needed to demonstrate that it was owed a specific legal obligation at the time the alleged false record or statement was made and that the obligation could not be a potential liability:

> To recover under the False Claims Act, we believe that the United States must demonstrate that it was owed a specific, legal obligation at the time that the alleged false record or statement was made, used, or caused to be made or used. **The obligation cannot be merely a potential liability**: instead, in order to be subject to the penalties of the False Claims Act, a defendant must have had a present duty to pay money or property that was created by a statute, regulation, contract, judgment, or acknowledgement of

> indebtedness. The duty, in other words, must have been an obligation in the nature of those that gave rise to actions of debt at common law for money or things owed.

Id. at 773. (Emphasis added).

The court in **Q International Courier, Inc.** also rejected the government's arguments that potential fines or penalties could serve as the basis for liability under **§ 3729(a)(7)**. According to that court, the statutes and regulations cited by the government might support a judgment that the defendants engaged in illegal or fraudulent activity, but those statutes and regulations, standing alone, did not create a legal duty to pay money and therefore did not constitute an obligation under **§ 3729(a)(7)**:

> A potential penalty, on its own, does not create a common law debt. A debt, and thus an obligation under the meaning of the False Claims Act, must be for a fixed sum that is immediately due. This regulation merely provides a range of penalties which might be assessed; it does not create an immediate duty to pay a specific sum.

Id. at 774.

In **United States v. Pemco Aeroplex, Inc., 195 F.3d 1234 (11th Cir. 1999)**, the Eleventh Circuit in an en banc proceeding briefly considered the meaning of an obligation under **§ 3729(a)(7)**. In that case, the Court did not make any rulings that conflicted with the Appellate Court's decision below. For example, in **Pemco**, **supra**, the court did not rule that potential or contingent obligations would satisfy the

requirements of **§ 3729(a)(7)**. Nor did the **Pemco** court decide whether the alleged concealment of possible or future fines or penalties would be actionable under the Act. In **Pemco**, the court held that the government had stated a reverse false claim because there was an existing legal obligation created by a government contract. This holding is entirely consistent with the Appellate Court's ruling, which expressly found that breaches of government contracts fall within the reach of **§ 3729(a)(7)**. **(App. 25)**.

The Court of Appeals' decision also is in accord with recent district court interpretations of the scope of the term "obligation" as used in the **False Claims Act**. For example, in **United States ex rel. Lamers v. City of Green Bay, 998 F. Supp. 971 (E.D. Wis. 1998)**, the court analyzed "obligation" in the context of a reverse False Claims Act qui tam action. Citing **Q International Courier** with approval, the court held that "[b]ecause Lamers cannot credibly argue that the City had or now has an immediate, recognizable obligation to repay . . . , Lamers claims under § 3729(a)(7) are not actionable." **Lamers, 998 F. Supp. at 998 (emphasis added)**.

Similarly, in **United States ex rel. S. Prawer & Co. v. Verrill & Dana, 946 F. Supp. 87 (D. Me. 1996)**, the court conducted a thorough historical analysis of the term. Rejecting the same arguments made by Petitioner herein, the **Prawer** court concluded that:

> "[O]bligation" in the False Claims Act refers to something more than potential liability or moral or social duty; a legal obligation seems to be the touchstone. * * * In fact, the legislative history twice refers to "money owed," as the kind of

> obligation that the reverse false claims prohibition is designed to cover. Money is not "owed" without a specific contract remedy, a judgment or an acknowledgement of indebtedness.

Id. at 94-95.

Further, the district courts that recently have decided **§ 3729(a)(7)** claims have not attempted to expand the definition of the term "obligation." **See United States v. Raymond & Whitcomb Co., 53 F. Supp. 2d 436 (S.D.N.Y. 1999)** (applying **Q International Courier's** definition of "obligation"); **United States ex rel. Dunleavy v. County of Delaware, 1998 U.S. Dist. LEXIS 4029 n.8 (E.D. Pa. 1998)** (indicating that "even under the most restrictive reading of **3729(a)(7)** . . . there was a present duty to pay money to the Government * * *").

Thus, the Sixth Circuit's decision below is in accord not only with the other Circuit Courts, but with recent District Court determinations as well.

C. The Court Of Appeals Decision Is Of Limited Import And Does Not Present A Significant Question For Review.

The Court of Appeals' decision does not resolve any critical issues that necessitate Supreme Court review. The Appellate Court's decision was limited to the alleged customs violations set forth in Petitioner's complaint. As such, it was not necessary for the Court of Appeals to define the entire scope of an obligation under **§ 3729(a)(7)**. The Appellate Court simply found that an obligation did not include contingent liabilities that may arise after the exercise of discretion by a government

official or that arise only because the government prohibited some act. (**App. 25**). These types of contingent liabilities clearly fall outside the reach of the **False Claims Act**, and recent courts considering the issue have agreed with that interpretation. **See Q International Courier, 131 F.3d 770; Lamers, 998 F. Supp. 971; Prawer, 946 F. Supp 87.**

Petitioner argues that this case presents an important issue because the Court of Appeals limited the reverse false claims provision to cover only contractual obligations and judgments. The Court of Appeals' opinion belies this assertion. The Appellate Court acknowledged that **§ 3729(a)(7)** may be applied to obligations created by statute or regulation that are contractual in nature (**App. 17**), but it did not consider these obligations since they were not at issue in the case:

> We leave for a more appropriate case the status of those obligations arising from the provision of "rights, privileges, or benefits," and those obligations created by statute or regulation that are "essentially contractual in nature."

(**App. 25**).

Petitioner also contends that a review is necessary because the Court of Appeals' decision will negatively impact attempts to curb the unlawful shipment of merchandise from China. The Government apparently did not agree with that assessment, because it supported affirming the dismissal of Petitioner's complaint. Moreover, there is nothing in the Court of Appeals' opinion that would prevent the Government or anyone else from attempting to stop illegal imports. There are numerous other laws that could be used, and as the Appellate Court found, "[r]ejecting the

expansive interpretation [of **3729(a)(7)** in this context] does not reward wrongdoers, of course, as they still face penalties for violating the underlying statute." **(App. 23)**.

II.

THERE IS NO COMPELLING REASON TO REVIEW THE APPELLATE COURT'S DECISION RESPECTING PETITIONER'S MOTION TO VACATE THE DISTRICT COURT'S DISMISSAL SINCE THE MERITS OF THE DISMISSAL HAD BEEN SUBJECTED TO DE NOVO CONSIDERATION.

A. There Was No Mandatory Requirement For The District Court Judge To Recuse Himself.

Petitioner sought to recuse Judge Holschuh under **28 U.S.C. § 455(a)**, which provides, in relevant part:

> Any . . . judge . . . of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

28 U.S.C. § 455(a). "The standard for recusal under 28 U.S.C. § 455(a) is 'whether [a] reasonable person, knowing all of the surrounding circumstances, would not consider the judge to be impartial.' " **United States v. Hurst, 951 F.2d 1490, 1503 (6th Cir. 1991), cert. denied, 504 U.S. 915 (1992)** (citation omitted). **See also United States v. Sammons, 918 F.2d 592, 599 (6th Cir. 1990)** (the judge must recuse himself only if his "impartiality might reasonably be questioned"); **Travelers Ins. Co. v. Liljeberg Enterprises, Inc., 38 F.3d 1404, 1408 (5th Cir. 1994)** (the movant "must show that, if a reasonable man knew of all the

circumstances, he would harbor doubts about the judge's impartiality") (citation omitted); **United States v. Yonkers Board of Education, 946 F.2d 180, 183 (2d Cir. 1991)** ("[t]he movant must show an appearance of impartiality based on 'what a reasonable person, knowing and understanding all the facts and circumstances would believe' ").

Several courts have found that a prior representation of a judge does not necessarily require disqualification. See, for example, **Duke v. Pfizer, Inc., 668 F. Supp. 1031 (E.D. Mich. 1987), aff'd, 867 F.2d 611, 1989 U.S. App. LEXIS 680 (6th Cir. 1989)** (the court affirmed a decision of the trial judge not to recuse himself on the grounds that the judge had been represented previously by a lawyer in a law firm representing one of the parties); **In re Beard, 811 F.2d 818, 831-832 (4th Cir. 1987)** (prior representation of the judge that had ended two years previously not sufficient to require disqualification); **Varela v. Jones, 746 F.2d 1413 (10th Cir. 1984)** (recusal denied where the law firm appearing before the court had handled the estate of the judge's mother during a portion of the case).

B. The Plenary Review Of The District Court's Dismissal Has Essentially Mooted Any Concerns Respecting Recusal.

Even if recusal was appropriate (which it was not), there is no mandatory requirement for a judge to vacate prior decisions upon his or her recusal. As the Supreme Court has noted, "[t]here need not be a draconian remedy for every violation of §455(a)." **Liljeberg v. Health Services Corp., 486 U.S. 847, 862 (1988)**. **See also Travelers Ins. Co. v. Liljeberg Enterprises, Inc., 38 F.3d 1404, 1411-1413**

(5th Cir. 1994); **In re School Asbestos Litigation, 977 F.2d 764, 785 (3d Cir. 1992)** ("[i]t does not follow, however, that this litigation must return to square one"); **In re Continental Airlines Corp., 901 F.2d 1259, 1263 (5th Cir. 1990)** ("[a]lthough a violation of §455(a) has occurred in the present case, reversal [of summary judgment] is not automatic"); **Canino v. Barclays Bank, PLC, 1998 U.S. Dist. LEXIS 53, *11-12 (S.D.N.Y 1998)** ("[the judge's] decision to recuse herself was a matter of prudence and discretion. Such a recusal does not call into question the validity of her [earlier orders]").

Contrary to Petitioner's claim, several circuit courts have held that vacatur is not warranted when a judge's decision will later be reviewed on a plenary basis. For example, in **In re School Asbestos, 977 F.2d 764 (3d Cir. 1992)** the court noted,

> The availability of later plenary review of the disposition of summary judgment motions . . . should be adequate to assure public confidence in past rulings without needless disruption of this very important litigation.

Id. at 788. Similarly, in **In re Continental Airlines Corp., 901 F.2d 1259** the court stated,

> The risk of injustice to the parties in allowing a summary judgment ruling to stand is usually slight. Such rulings are subject to de novo review, with the reviewing court utilizing criteria identical to that used by the court below.

Id. at 1263. See also Bhatla v. U.S. Capital Corp., 990 F.2d 780, 788 n.10 (3d Cir. 1993).

Here, Judge Holschuh's decision was based entirely upon questions of law that were reviewed de novo by a subsequent District Judge and the Court of Appeals. As such, it was not necessary for another District Judge to examine Petitioner's claims. Therefore, even if recusal was required (which it was not), the risk of injustice in this case was minimal given the plenary reviews of Judge Holschuh's opinion.

Petitioner argues that vacatur was required under **Harris v. Champion, 15 F.3d 1538 (10th Cir. 1994)**. Petitioner readily concedes in its petition, however, that the court in that case did not vacate the court's prior decisions. Indeed, in **Harris**, the court recognized that:

> [V]acating the decisions and remanding for new proceedings that would be largely duplicative of those before us, however, would, if anything, increase the risk of injury to petitioners by delaying even longer any federal consideration of their constitutional claims.

Id. at 1572.

Therefore, Petitioner has failed to demonstrate a compelling reason for this Court to review the Court of Appeals' decision not to vacate the District Court's dismissal.

CONCLUSION

For all the reasons stated above, by the Court of Appeals, the District Court and the Limited Defendants, the Tarrant Defendants respectfully request that the petition for a writ of certiorari be denied.

Respectfully submitted,

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